Bavaria in the list of independent sovereignties. And though he had himself no faith in immortality, and hardly knew that there is a God, he yet was an instrument in the hands of Providence for upholding the Protestant religion on the continent of Europe. Had he not succeeded in raising Prussia into the number of the great powers of Europe, the Roman Catholic faith would have been predominant in every important state from Lisbon to Warsaw, and the reformation have been left without any strong defence in the very land of Luther.

ART. II.—1. *The Law of Infancy and Coverture.* By PEREGRINE BINGHAM, of the Middle Temple. First American Edition. 8vo. pp. 367. Exeter. 1824.

2. *Traités du Contrat de Mariage, de la Puissance du Mari, du Contrat de la Communauté, et du Douaire.* Par POTHIER. 4 tomes. 8vo. Paris. 1821.

POETS have sung the praises of woman, throughout all ages, in strains of admiring enthusiasm, strikingly contrasted with the actual condition of the female sex. They have painted her in the brilliant coloring of love; and then raised the matchless creation of their fancy to an elevation in the ranks of life as ideal as it is exalted. Chivalrous devotion to the cause of beauty, humble adoration of the charms of person and tenderness of heart that belong to the gentle soother of human adversities, are the favorite themes of inspiration in the ardent season of youthful passion. We place her so high,

> It were all one
> That we should love a bright particular star,
> And think to wed it.

But a spirit, alike destitute of manliness and of gallantry, has too often presided over the formation of the laws, which fix the rights and obligations of woman in the social scheme. These have fluctuated in different countries, and at successive periods of human history, according to the varying combinations of causes by which national character is governed.

Inquire among barbarous tribes, who earn a scanty subsist-

ence by hunting or fishing, or among nomadic nations, who range over extensive regions with their flocks and herds in primeval freedom, and you find that man arrogates to himself all the nobler pursuits of ambition, whilst woman is degraded too frequently to the level of a domestic drudge, or made the overtasked bondwoman of her selfish lord. War, with all its invigorating perils and its heart-stirring glory, is his; the chase, that mimic picture of war, is his; to mould infant states into the elements and proportion of greatness, to control the destinies of empire, is his; while in such uncivilized conditions of society, hers are the tamer duties of home at best, and oftentimes the severer labors of the field, which none but a savage would impose upon the gentler sex. Ascend one step higher in the scale of civilization, and follow woman amid the dazzling splendors of oriental luxury, and there you find she ministers more essentially to the refined happiness of man; but it is only as the purchased or favored companion of his hours of softness, not as the intellectual being, who is man's equal in all the best properties of his nature, his superior in some, and beneath him in nothing but those robust features of understanding and sterner qualities of character, which seldom, in the same person, harmonize with the kindlier affections of the soul. Nowhere, but in the fortunate countries which enjoy the blessing of European refinement, does woman approach in condition to that just equality with the other sex, which the sober and rational pursuit of their common felicity requires she should possess, which in the mere contest of physical strength she probably might never attain, but which man is proud to concede and woman to receive at his hands, where both the gift and its acceptance are alike honorable to humanity.

Yet even there, either man has been accustomed to profess more consideration for the rights of woman than he truly felt, or the execution of his purposes has lagged behind the intention. There is a pleasure which the polished Athenian, with all his epicureanism of taste, had but imperfectly learned, that of frequenting and rightly appreciating the society of the other sex, educated to as high a degree of intellectual culture as himself, and accomplished alike to move in her appropriate sphere of dignity and usefulness. Roman austerity was too near akin to unsocial rudeness, at least in the days of the republic, Roman courage too fond of camps, conquest, and free quarters, Roman ambition of too exclusive and selfish a char-

acter, to admit woman to the elevation by the side of man, which is the surest evidence of genuine public refinement. The examples to which we shall presently refer, of highly educated Roman matrons, constituted the exceptions and not the general rule. Nay, in communities over which the benign influences of christianity have fallen, which boast that they are imbued with the spirit of chivalry, whereof gallantry towards the sex was a main ingredient, in the fortunate nations of modern Europe and their more fortunate offsets in the New World, it is most true that the exalted standing of women grows out of the manners, temper, usages, and unwritten institutions of the people, rather than the established laws of the land. In countries that derive their laws from the civil code, woman retains many valuable rights of property in the married state, but elsewhere her legal condition during coverture is defined by the simple and comprehensive, because despotic rule, of the complete merger of her rights, whether relating to person or property, in those of her husband. Exceptions to this will be stated in their proper place; but according to the significant phraseology of our law, she is only his *feme* or wife, but he is her *baron* or lord.

We do not propose to ourselves, in the remarks which are to follow, to set up for the female sex any extravagant standard of legal privilege, nor to lay lance in rest for the support of quixotic pretensions, in her behalf, to political or municipal rights adverse to those of the male sex. The constitution of nature, ordained by no human conventions, recorded in no fundamental charter of government or petition of rights, but written over the face of the universe, and stamped indelibly upon the very organization of our race, has, we conceive, settled the question, whether the female sex should exercise political franchises equally with man. As the nominal head of a monarchy, the empire of woman has in many signal cases proved highly auspicious. But this fact rests upon principles of its own. It will not answer to infer that the troubled arena of politics or of war best befits the refined character of woman, her gentle virtues, or the blended intellectual, moral, and personal beauty, which holds the stronger sex in bondage. We must take our election. Give to woman

> Ogni virtute,
> Ogni bellezza, ogni real costume,
> Giunti in un corpo con mirabil tempre;

and still it will be impossible to unite, in the same individual, the feminine loveliness of Venus with the manly limbs and rough-hewn sinews of Alcides. Nature, therefore, has clearly indicated the orbit, in which either sex should revolve; and were they to cross each other's paths, confusion and disorder would inevitably ensue to punish their rash eccentricity. We do not esteem it any hardship, as some have done, that the property of an unmarried female is taxed without being represented. The maxim, that taxation and representation should go hand and hand, is most salutary; but no general maxim in morals is free from exception or qualification. Taxation procures for property the protection of the body politic; and neither the alien-friend who claims the safeguard of our laws, nor the unmarried female, nor the minor, whose estate the government guaranties against domestic pillage and hostile invasion, has just cause to complain of exclusion from elective privileges. Disclaiming, therefore, in the outset, any design to call in question the great principles of social compact, whose truth the experience of all the world confirms, we proceed only to call the attention of our readers to such peculiarities in the legal condition of woman as may lead to instructive conclusions. It is not the institutions of an Amazonian republic, in the regions of fable or in some Utopia of our own, that we seek to commend; but we shall speak of man as we find him, or as we may hope, without falling into Condorcet's vision of perfectibility, he shall one day become.

It would be highly agreeable to examine the legal condition of women among the ancient Greeks; but to avoid prolixity or distraction of views, we shall commence with inquiring into her duties and rights by the civil law. At Rome, the condition of the female sex, in the time of the kings and the early consuls, was purely domestic; and the sole aim of her education was to fit her for superintending the interior economy of her family, and instructing her own daughters in the arts of household industry. It was made a condition of peace, on the conclusion of the war occasioned by the rape of the Sabine virgins, that the Romans should not exact any labor from their new wives except spinning. (*Plutarch. Romulus.*) Caia Cæcilia, the wife of Tarquinius Priscus, was celebrated for her skill in the art; whence her name was borne by the bride in the marriage ceremonies. (*Plin.* viii. 48.) Other portions of the solemnity had a similar allusion; thus handmaidens followed the bride,

bearing a distaff, with a spindle and wool, intimating that such was the appropriate occupation of the Roman matron. Hence the frequent allusion in the poets to this primitive branch of female industry (*Æneid*, viii. 408 and ix. 488, and *Ovid. Fast.* ii. 741); and hence, the old writer, while enumerating the qualities of a good wife, to *probity*, *beauty*, *fidelity*, and *chastity*, added *lanificæ manus*, skill in spinning and weaving wool. And although Suetonius (*August.* 73) relates that Augustus seldom wore anything for his domestic garb but of the manufacture of his wife, daughter, and the other ladies of his household; yet Columella laments, as a proof of the degeneracy of matrons in his day, *ut ne lanificii quidem curam dignentur*, that they disdained even the care of the spindle and distaff. He commends the matrons of the olden time, who assumed the whole charge of domestic affairs, and by their assiduity and activity at home, endeavored to equal and second the laborious industry of their husbands abroad; and however preëminent for beauty, aspired to no distinction, were ambitious of no merit, but that of superiority in the thrifty arts of housewifery.

In this period of Rome's frugal simplicity it was, when man deemed his *consort*, the partner of his life, worthy of no higher employments or enjoyments than handicraft labor, that the ancient law conferred on a husband immense power over the person of his wife. He might exercise, in short, the *patria potestas*, the tyrannical paternal power, which extended, in its original severity, to life and limb, in the government of his wife as well as of his children and household. (*Brown's Civ. L.* i. 85.) Tacitus records a remarkable instance in which this power was exercised at a late period. We copy it in his words. In the reign of Nero, Pomponia Græcina, a woman of rank, being married to Plautius, who enjoyed the honor of an ovation for his victories in Britain, being afterwards accused of *foreign superstition*, was consigned to the judgment of her husband; and he, *after the ancient usage*, in the presence of their relations, took cognizance of the life and reputation of his wife, and pronounced her innocent. (*Tac. Annal.* xiii. 32.) Dionysius of Halicarnassus and the elder Pliny affirm, that for grievous crimes he might inflict death upon her (*Dionys.* ii. 25, *Plin.* xiv. 13); and of course he had authority to subject her to corporal punishment for lesser offences. Out of such barbarous usages sprung the position of the old Roman law, which permitted a husband to chastise his wife with the same instru-

ments of punishment that he applied to his slave; *flagellis et fustibus acriter uxorem verberare.* Having reference to the same point, is the saying of Cato the Censor, that he who struck his wife or child, laid his sacrilegious hand on the most sacred things in the world. But all these things are exploded severities, which the civil law in the days of its perfection justly condemned. For the least violence done to the person of a wife by her husband, having regard to the condition of the parties, entitled her to a separate maintenance. The civilians hold, that among persons of respectable condition, the slightest blow given by a husband to his wife, unless occasioned by very gross provocation, and even continued ill usage without being carried to the excess of personal violence, is good cause for granting her a divorce from bed and board. (*Poth. Con. de Mar.* 492.)

The civil law also authorizes the husband to require the society of his wife, and to exert such control over her person as may be necessary for the attainment of that object. It gives him a right of action against any person who entices her from him and with whom she takes refuge; and process against her to compel her to return to his abode. (See *Code Napol.* 214.) In opposition to this she can urge no objection, except such as may be good cause of separate maintenance or of divorce. The modern writers on the civil law elucidate this point by various cases. Thus, it is said, the wife cannot allege, as sufficient reason for leaving his house, that the atmosphere of the place is injurious to her health, or calculated to engender infectious distempers. But she is not obliged to follow him if he removes from their common country; for her obligation to her country is holden to be paramount, and although he may choose to abandon it, he cannot compel his wife to imitate his abjuration. Such are among the principal modifications, to which the right of a husband over the person of his wife is subject by the civil law. The rights of property we shall consider in the sequel; but what we have already said is sufficient to show how ill founded is the exultation of Blackstone at the cruelty in this respect, which he charges upon the laws of Rome. (1 *Com.* 445.) It is one of those disingenuous reflections, which he throws out against the civilians on several occasions, generally when he is upon a weak point of the common law, to disguise which he seeks to create a diversion by bringing into view some alleged defect of the rival code.

Our readers are to remember that ultimately mere consent, without any outward ceremony whatever, constituted a valid marriage at Rome, as it does now in Scotland and several other countries of the civil law. It was only by a solemn marriage so called, that the *patria potestas*, with all its monstrous consequences, was conferred on a husband; and even then, if his wife had not been emancipated by her father, she remained under her father's power, not her husband's. (*Brown, C. L.* i. 86.) And while upon this point, we may observe, that, as a consequence of the marital authority of the husband over his wife, she, as the mother of his children, did not participate in his power over them, which was paternal merely, not parental. They were alike subject to the master of the family. (*D'Arnay, Hab. des Rom.* 250.) 'A fiction of the law,' says Gibbon, 'neither rational nor elegant, bestowed on the mother of a family the strange character of sister to her own children, and of daughter to her own husband or master, who was invested with the plenitude of paternal power.' (*Rom. Emp.* ch. 44.) A solemn marriage among the Romans was effected in three ways; 1. By prescription, when a woman, having the consent of her parents, went to her husband's house with intent to contract matrimony, and lived with him uninterruptedly one full year; 2. By confarreation, when the parties partook of sacrifices, and eat in communion from a consecrated wafer; and 3. By coëmption, which was a supposed mutual purchase, each delivering to the other a small piece of money, and repeating certain set words of contract. (*Heinec. Antiq. Roman.* l. 1. t. 10.) When thus married, the bride was said to come into the hands of her husband. (*Taylor, Civ. L.* 283.) She thereby resigned to him all her goods, and gave him full power over her person, acknowledging him for lord and master. She became his *consort* for life, the partner of all his rights, civil and sacred; and if he died intestate, she inherited his estate equally with his children, and if he left no children, she was his sole heir. Indeed so many important legal effects followed a solemn marriage, when celebrated with appropriate rites, that these, making no part of its essence, nor being requisite to render the contract complete, gradually fell into desuetude, as the increasing wealth of the city caused the rights of property to be more complicated, and foreign conquests introduced greater refinement of manners. Marriage by consent, a mere civil contract, supplied the place of the ancient religious ceremonies.

After the Romans had carried their arms out of Italy, when a taste for science and the arts began to gain ground in the republic, the education of woman was no longer confined to the humble sphere of household cares. Ladies of rank and fortune became ambitious to acquire the charms of mind as well as person; literature ceased to be cultivated by the male sex alone; and woman sought to drink at the same fount that inspired the world of poets, philosophers, and orators around her. Cicero commemorates several Roman ladies of his age, remarkable for highly finished education. The two Gracchi, as distinguished by their eloquence as their tragic destiny, were taught the graces of speech, by which they reigned in the assemblies of the people, under the tuition of Cornelia, who was a model of purity in the use of her native language. (*Plutarch. Tib. Gracchus, Cic. Brut.* c. 58.) And Tacitus, or whoever else was the author of the beautiful dialogue on oratory, places alongside the example of Cornelia, that of Aurelia, the mother of Julius Cæsar, and of Atia, the mother of Augustus, who presided over the education of those future masters of the world. (*De Orat.* c. 28.) Appian preserves the speech of Hortensia, daughter of Tully's rival in the forum, who, when the triumvirs required an arbitrary and forced contribution from fourteen hundred ladies of rank, in order to raise levies against Brutus and Cassius, boldly pleaded the cause of herself and her companions before the tribunal, to which the oppressed people dared not to lift their eyes. (*Appian. Civil.* l. 4, *ed. pr. Steph.* p. 310.) Cicero was on terms of close intimacy with a lady named Cærellia, famous for her literary taste. (*Epist. Attic.* xiii. 21.) He applauds the elegant latinity of Lælia, daughter of C. Lælius, and her two daughters by Mucius Scævola the augur, one of whom married the orator L. Crassus, and had daughters, equally celebrated with the rest of their family for elegance of understanding and the judicious pursuit of letters. (*Cic. Brutus*, c. 58.)

The augmented consequence, which such examples of cultivated female taste conferred on the sex, could not fail to produce a melioration of the extreme rigor of the laws of marriage. A change for the better, as it would seem, must have taken place gradually, like most radical changes in the manners of a nation, and almost imperceptibly. It began by the disuse of the rites of confarreation, the most solemn form of marriage. At what precise period this happened, does

not clearly appear; but probably before the time of Cicero, because the orator, in his defence of L. Flaccus, alludes to marriage as contracted only by coëmption and by prescription. (*Cic. pro L. Flac.* c. 34.) The disuse, however, is distinctly averred in a remarkable passage of Tacitus. In the reign of Tiberius, a question arose concerning the choice of a *flamen dialis* in the place of Servius Maluginensis; and the emperor's rescript recommended some new provision upon the subject. 'According to the ancient usages,' said Cæsar, 'three patricians, born of parents married by confarreation, were to be nominated, and one of them must be chosen for *flamen dialis;* but the number of them was now greatly diminished, the rites of confarreation being obsolete, or observed by few. For this many causes might be assigned; a principal one being the inconsiderateness of either sex; but the ceremony itself was purposely avoided, on account of the embarrassments attending it.' 'The senate ought to provide a remedy either by a decree or law; just as Augustus had softened many of the barbarous forms of antiquity into the existing improved usages.' (*Tacit. Annal.* iv. 16.)

A Cato or Brutus might have replied, perhaps, had there been a Roman of the old republican stock alive to address the tyrant with free speech, that among those customs derived *ex horridâ illâ antiquitate*, which Augustus had discarded, the sacred bulwarks of liberty had fallen; and that the *præsens usus* which Tiberius applauded, was the arbitrary despotism of usurpers. But the mitigation of the *patria potestas* in the hands of a husband was not the less a benefit; nor the substitution of intellectual pursuits for the female sex in the place of mechanical ones, the less an improvement. If the ladies of Octavianus Cæsar's family wrought his garments in evidence of their skill, or as voluntary testimonials of their regard for the emperor, it might be well; but really our opinion of his taste and good sense would be greatly lowered, if we could believe that he exacted it in obedience to some of the primitive Roman notions of domestic economy. When the wealth of the city was such that a patrician would possess a vast family of slaves, to the number of hundreds, and in some cases of thousands (*Athenæus*, vi. 20), having in the comprehensive language of Tacitus, whole nations of either sex in his household (*Annal.* iii. 53. xiv. 44), educated to perform every duty therein except that of its head, it would be strangely preposterous if ingenuous

Roman matrons must waste their time upon the same housewifery accomplishments, that were in vogue when thatched cottages occupied the future site of the marble basilica of the Palatine.

To form a just idea, therefore, of the condition of women at Rome in respect of property, we must look to the law as understood in the latter years of the republic and the early ones of the empire. Considering marriage by consent as the established form, the civilians founded upon it the doctrine, that husband and wife might grant to and contract with each other, and mutually sue and be sued; only it was provided, lest one party should ever be tempted to take ruinous advantage of the other's fondness, and affection become the dupe of art, that gifts between them without a valuable consideration were void. To prevent either from injuring the other's property, the contracts of the husband were inoperative upon the wife, as hers were upon him, and they were wholly unconnected in their agreements with a third person. Hence a wife might sue or be sued separate from her husband; and although he was obliged to maintain her, yet if he failed to do this, it only gave her a right to sue him for alimony, but did not subject him to liability for debts of her contracting. (*Brown, Civ. L.* 82.)

In order to understand the legal state of a wife's property during marriage, it must be premised, that her estate was divided into two portions, namely, *bona dotalitia*, and *bona paraphernalia;* the first being, properly speaking, her marriage portion or dowry, the second being any property over and beside her dowry, and not confined, as with us, merely to wearing apparel, jewels, and the like. Property included in the latter denomination, whatever its quantity or quality, was absolutely at her free disposal, to be used or aliened by her at pleasure, without her husband's consent or authority. It was otherwise with the dowry, when no special agreement had been made concerning it. The marriage operated a transfer to the husband of all the *bona dotalitia*, conferring upon him a qualified property therein, subject to his wife's right of restitution if she survived him, or on the dissolution of the marriage during their lives.

According to Pothier's view of the matter, which seems to us rather artificial, she was not proprietor of the dowry during marriage, but only creditor of her husband for its restitution; on account of which right of restitution it is, he says, that the

texts of the law call it her property and patrimony. (*Puissance du Mari*, 710.) But it is evident, from consideration of the fact, that it was far more proper to call her the owner. No part of it survived to the husband by law, even if there were children by the marriage. If it consisted of immoveables, he received the rents and profits, in consideration of his supporting the charge of the marriage state; but he could alienate no part of the capital *(fundus dotalis)* without her consent, nor bind it with her consent. If the dowry consisted of moveables, he was permitted, for the interests of commerce and because of the necessity of disposing of perishable articles, to alienate them; but he was bound to make good the value; and to assure her of this, he gave security by the *donatio propter nuptias* out of his own property, for the restitution of her fortune, or an equivalent for it, on the dissolution of the marriage. This security he could neither alienate nor mortgage, even with her consent, unless in certain specified cases of extreme necessity, or by providing an equivalent. In addition to this she had a general lien upon all his property to the amount of her dowry, and was entitled to preference over all other incumbrances, even those of prior date. If he became insolvent or embarrassed in circumstances, she might take possession of her portion or the security, or bring her action for it. (1 *Brown's Civ. L.* 266).

Now these rules we conceive to be, in the main, most equitable and just. From this encomium we should except, perhaps, only a single thing, the provision, namely, preferring the wife's claim to those anterior in date; which seems to us injurious to the rights of *bonâ fide* creditors. How different our own law is in every respect, will appear in the sequel. But the foregoing principles are acknowledged in all countries whereof the jurisprudence is founded upon the civil law, subject to greater or less modifications, introduced by the barbarian conquerors of the empire, by the christian clergy, or by changes incident to the lapse of time. Take the old custumary of Paris for an example. The law distinguished the wife's property into her private estate, and estate held in community, which is the technical term for the species of partnership in effects created between husband and wife by the marriage. He had entire control over the goods of the community, so long as it lasted, with the right to dispose of them without his wife's interposition. But she and her heirs became creditors of the community

to the amount of her contribution, having a lien therefor upon all the specific effects in the hands of the husband or his heirs at the dissolution of the marriage. The private property of the wife, so called, consisted of immoveables, or estate having the nature of a perpetuity, and such moveables as by the marriage contract should be expressly excluded from the community. Over all this, a husband possessed certain rights of bailment and administration, comprised principally in three particulars. First, titles of honor, baronial rights, allegiance, feudal duties, and everything honorary attached to her private estate, belonged to him during the marriage. Secondly, he was entitled to receive all the rents and profits of her estate. Lastly, he had a right to administer and manage the property for their common advantage, including the power of making short leases. (*Poth. Puis. du M.* 2.) And more recently the *Code Napoleon* (L. iii. t. 5.) authorized parties to declare in a general manner, that they intended to be married either under the law of community or the law of dowry, that is, subject to the customary or the civil law, and provided specifically for the rights and duties which should flow from either alternative.

The relaxation of the primitive rigor of marital rights at Rome, favorable as it was to the pecuniary condition of woman, was unfortunately brought about by means, which introduced a pernicious facility of divorce. We say pernicious, because, notwithstanding the specious reasoning of Milton and some other writers who have maintained the contrary, it seems to be conceded by the soundest lawyers and moralists, that the experience of republican Rome and of republican France settles the dispute. (4 *Johns. C. R.* 197, 503; 1 *Haggard*, 36). The fluctuations which the Roman law underwent are remarkable. Originally, it may be supposed, when the paternal power existed in all its rigor, the husband might sell his wife as well as his children, or harshly expel her from his bed and house. (*Gibbon*, ch. 44.) Romulus permitted the liberty of divorce to the husband, if his wife violated the conjugal faith, used false keys, or drank wine without his knowledge. The right was denied to the wife; but if abused by the husband, he forfeited his goods, one half to his injured wife, and the other half to the goddess Ceres. (*Plutarch. Romulus.*) Divorce, it is supposed, was also sanctioned, and the privilege of it extended to both sexes, by the Twelve Tables. (*Cic. Philip.* ii. c. 28.) But, to the honor of Roman domestic

character be it said, no example occurs of the exercise of this privilege by a husband until the year 523 A. U. C., when Spurius Carvilius Ruga, remembered only for this act, repudiated a fair, a good, and, as our authors affirm, a beloved wife, because of her barrenness. (*A. Gellius*, iv. 3; *Val. Max.* ii. 1.) For this 'he was questioned by the censors,' to use the language of Gibbon, 'and hated by the people; but his divorce stood unimpeached in law.' But in process of time, the right was greatly abused, as passion, caprice, or interest suggested motives to the husband or the wife for the dissolution of their union.

A marriage contracted in the most solemn forms could be terminated by some corresponding solemnity; for confarreation, there was the opposite sacrament of diffarreation; and they who were united by mutual purchase could be separated by remancipation. And in later times, when marriage was merely a voluntary union by consent, it could be dissolved, like any other *community*, and by the slightest act, word, or writing, that distinctly signified the will of the parties. The marriage contract might be torn in the presence of witnesses, or the keys taken from the wife, or the words '*Res tuas tibi habeto*,' pronounced by a freedman, or despatched in a written message; and the most tender and solemn of human connexions was thus lightly thrown off at will. (*Adam's Rom. Antiq.* 511.) If the divorce was made without any fault of the wife's, she received back all her property; but if she was culpable, the husband retained part of her dowry, as a consideration for his remaining subject to provide for the support and education of their children; and if she was repudiated for infidelity, she was punished by the loss of all her dowry. (*D'Arnay*, 238.) Such a consequence might sometimes prove not unacceptable to a mercenary husband; and that entertaining old gossip, Plutarch, mentions one Tinnius, who married Fannia, a woman of notoriously bad character, and then divorced her, as it seems to have been suspected, out of speculation, in order to secure her dowry. (*Plut. Marius.*) When the exercise of the right of repudiation had grown less odious then at first, the facility of divorce gave rise to many cases of the deepest individual affliction. The great Æmilius Paulus divorced his wife Papiria, the mother of a family of heroes, without any assigned cause, or any reason whatever, which his friends could divine. (*Plutarch. Paulus.*) C. Sulpicius Gallus repudiated his wife because she appeared in public with her head uncovered. Sempro-

nius Sophus repudiated his, because she went to the theatre without his knowledge. Q. Antistius Vetus did the same, because his wife conversed in public with a woman of low condition. (*Val. Max.* vi. 3, *no.* 10, 11, 12.) Julius Cæsar divorced his third wife, Pompeia, the niece of Sylla, because Clodius gained admission into her house, in the disguise of a female musician, while she was celebrating the mysteries of the Bona Dea; yet, when questioned on the subject, he admitted that he did not believe Pompeia to be guilty, but that Cæsar's wife must not even be suspected. (*Plutarch. Cæsar; Sueton. Jul.* 6.) Cicero divorced his wife Terentia, at the close of the civil war, after living with her more than thirty years, alleging that her temper was overbearing, and that she had deranged his domestic affairs by want of economy. Ere long, however, he married Publilia, a young heiress of whom he was guardian, as Terentia said, on account of her beauty; but his freedman, Tyro, affirmed that it was because of her wealth, which he needed to discharge his debts. But after he lost his daughter Tulliola, Cicero repudiated his new bride, because he thought she rejoiced at Tulliola's death. (*Plutarch. Cic.*) Augustus separated from his wife Scribonia, either for her bad character, or because she complained too much of his own infidelity, and then compelled Tib. Claudius Nero to repudiate his wife Livia, although with child at the time, in order to marry her himself. (*Stem. Cæs. ad fin. Tac. no.* 45, 66.) Considering all the facts, too much censure, we conceive, has been cast upon the younger Cato for surrendering his wife, Marcia, to his friend Q. Hortensius. Cato regularly repudiated his wife, and she was regularly married to Hortensius; there being nothing peculiar in the case, except that he repudiated her for this very purpose. (*Kennet*, 319.) After the death of Hortensius, Marcia was again married to Cato. These examples might be multiplied to a great extent; but we have deemed it enough to select a few cases by way of illustration, either remarkable in themselves, or on account of the individuals principally concerned.

The instances we have given are all of repudiation by the husband; but women did not fail to avail themselves of the privilege. We have a parallel even for the case of Paulus Æmilius; for Cœlius, in one of his letters to Cicero, tells him, among other news of the day, that Paula Valeria, the sister of Triarius, had seen fit to repudiate her husband without any

particular reason, upon the very day of his return from the province; and was now about to marry D. Brutus. (*Epist. ad Div.* viii. 7.) Seneca sarcastically observes, that many women, in his day, counted the years, not by the number of consuls, but of their husbands (*De Benefic.* iii. 16); and Juvenal alludes to the same state of manners in his satires (*Sat.* vi. 20). Yet it never became reputable for women, whether divorced or widows, to have several husbands. We read in Propertius of a lady, who prided herself that she had been *uni nupta*, 'married to but one husband,' and desired to have it engraven upon her monument. And *univira*, 'once married,' is found in many ancient inscriptions as an epithet of honor. None, who married a second time, were permitted to officiate at the annual sacred rights of Female Fortune. Yet examples were not rare of ladies of rank and character, repeatedly married. Fulvia, the imperious wife of Antony, had been previously married, first to Clodius, and afterwards to Curio. Terentia, after being divorced by Cicero, married his enemy, Sallust, and had Messala for her third husband. Nay, Dio relates that Vibius Rufus, who was consul in the reign of Tiberius, boasted of possessing two things, which belonged to the greatest men of the preceding age, namely, the wife of Cicero, and the chair in which Cæsar sat when he was assassinated. Tulliola, scarcely a year after the death of C. Piso, was wedded to M. Furius Crassipes; and being soon afterwards repudiated by him, was married the third time, to Cn. Dolabella, whom she quitted on account of his bad temper. Indeed, without citing these particular instances, it is evident that second marriages were frequent, since otherwise it would not have been deemed so honorable to live in widowhood; for public respect is apt to follow those acts, which are less common, and, which, indicating superior exertion or superior self-denial, therefore attract the greater applause. (*D'Arnay*, 239.)

It should be added that the Romans, with all their licentiousness and laxity of manners, never sanctioned polygamy, except for a short time in the reign of Valentinian the First, who, wishing to marry a second wife himself, made the right universal. But the practice did not generally obtain, and the old prohibitory laws were revived by Justinian in compiling the Code and Digest. Plutarch, indeed, considers Antony as having violated the principle, and married two wives at the same time, Octavia and Cleopatra; but as by the laws of Rome a legal mar-

riage could be contracted only between free citizens, Cleopatra was not, and could not be married to Antony (*Taylor, C. L.* 345), nor Berenice, queen though she was, be the wife of Titus (*Gibbon*, ch. 44). Well aware of the injurious consequences attending the extreme facility of divorce, Augustus attempted various expedients for checking and chastising its license, none of which proved very efficacious. The prevalence of celibacy in Rome at this period has been ascribed partly to the fact, that freedom of divorce was less favorable to males than females, because it left the former burthened with all the children who sprung from the marriage. To remedy the evil, Augustus passed the famous law Papia-Poppæa, imposing various disabilities upon the unmarried, and conferring correspondent advantages upon the father of a family. So earnest was the emperor in the promotion of this object, that he gave Hortensius a sum of money to enable him to marry according to his condition, and prevent the extinction of the illustrious family of the Hortensii; a case strongly contrasted with that of a nobleman in England, George Nevile, Duke of Bedford, who was degraded from the peerage in the reign of Edward the Fourth, by act of parliament, on account of his poverty. When the christian religion had gained a permanent footing in the empire, a struggle ensued between religious principle, which tended to restrict, and the customs of the country, which continued to protect, divorces by consent, until long after the time of Justinian. (*Gibbon*, ch. 44; *Poth. Con. de Mar.* 436.) But with the declining power of the western emperors, a new jurisprudence on this subject arose, more compatible with the dignity and purity of the matrimonial connexion. Marriage again resumed, in the countries of the civil law as well as elsewhere, the sanctity which originally attached to the contract, without which everything most venerable and most to be cherished in domestic life would fall a sacrifice to irregular passion. It is not probable that any nation will soon renew the experiment, which was tried in France during the revolution, when marriage was again reduced to a union so loose and transitory, that it was justly described as 'the sacrament of adultery.' (*Scott's Napoleon*, I. 240.) The Code Napoleon (*No.* 275 *et seq.*) checked, indeed, the unlimited freedom of divorce, by throwing obstacles in the way of sepation by consent, but still suffered it to take place, if the parties persisted in desiring it. (4 *Johns. Ch. R.* 194.)

Preparatory to entering upon a detailed explanation of the rights of woman by our own law, it is proper to state the general principle, on which all the particular doctrines are founded. This cannot be put in stronger language, nor in terms more to our purpose, than Sir William Blackstone uses. 'By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law French a *feme covert;* is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage.' (1 *Com.* 442.) If any confirmation of the legal correctness of the illiberal doctrine laid down in the foregoing extract were needed, it might be derived from a comparison of the condition of a married woman with the nearest analogous case, that of a person under age.

Various disabilities attach to the condition of minority. Infants, that is, persons under age, are supposed to be destitute of sufficient understanding to contract. The law therefore protects their weakness and imbecility, so far as *to allow them to avoid* all their contracts, by which they may be injured; but in favor of infants, they are bound by all reasonable contracts for their maintenance and education, and also by all acts, which they are obliged by law to do. (6 *Mass. Rep.* 78.) For the most part, their bargains are not void, but voidable only; which they may rescind or ratify at their election on their arriving at full age. They may ratify the agreement, if they think it for their advantage, and rescind it if it was inexpedient. But the disabilities incident to a married woman are not designed for her benefit and protection; but for the security of her husband. Hence her contracts are not voidable merely, upon a given contingency, or at the election of her husband, but with few exceptions, they are absolutely void; and this simply on the ground of the suspension of her legal existence during the coverture. For this monstrous doctrine of our law no better reason can be assigned, we imagine, than Bingham alleges, namely, the right of the stronger. (*Coverture*, 182.) It is sanctioned neither by justice, nor public policy, nor the exi-

gencies of social life. On the contrary, it is a principle, whose antiquity is its only commendation, and which, in its operation, has involved the courts in continual embarrassment.

It is unjust, because it throws the wife and her property entirely into the hands of her husband, and leads to acts of oppression on his part, and of suffering on hers, as numerous as they are remediless. It is idle to apprehend, that to allow her any separate and independent rights would occasion domestic dissension, or impair that reasonable preëminence, which ought to belong to the master of the family. The experience of the great body of the civilized nations of Europe demonstrates the reverse. The knowledge possessed by both parties, that each retained valuable rights, notwithstanding the union of persons, would necessarily promote mutual forbearance and respect. It is not enough to say, that because man has more experience of the world, greater knowledge of and aptitude for business, therefore woman should be deprived of legal existence. All the advantage of his superior skill is attainable by allowing him the government of his family, and the administration of all the property belonging to him and his wife. That the extent of her disability is against public policy, and contradicted by the exigencies of society, clearly appears; because, for three centuries past, the law in this respect has been constantly making progress from the barbarous severity of its original institution into an improved state, more consonant with the complicated relations of property at the present day, and with the refined opinions and feelings of a lettered and cultivated age, in which woman has ceased to be the handmaiden, and has risen up to be the choicest companion of man. We have seen how the course of improvement in manners at Rome unloosed the rigorous bonds which fettered the condition of woman. In England and in our country, the melioration has been less considerable, either in fact or in theory; but legislative assemblies have occasionally done something; and the courts, obeying the necessity of the times, have done more, by moulding the plastic substance of the common law into such form and consistency as their discretion approved. Still, as a cursory review of female rights by our law will show, even with all the benefits derived to woman by the irregular interposition of the courts of chancery, her legal condition is honorable neither to the generosity nor to the good

sense of that sex, which alone exercises the right of establishing laws.

Whether these observations are well founded or not, will be ascertained from examination of the doctrines of the common law, as they are expounded in the books. The cases adjudged upon this subject cannot be more conveniently classed, than by discriminating between them as they relate, first, to the person, and, secondly, to the property, of individuals in the married state.

To begin, then, with the relations in which woman is considered *criminaliter*. By the common law, it is no higher crime for a husband to kill his wife, than if he killed a stranger; but if the wife murders her husband, it is considered a more atrocious act. She is regarded not only as violating the restraints of humanity and the ties of conjugal affection, which would be equally true of the husband if he were the offending party; but, by help of an absurd fiction, she is further adjudged to have broken the *allegiance* which she owes to her lord, and to be guilty of the crime of treason. And for this offence she was liable, previous to the statute 30 George III, ch. 48, to the same punishment as if she had murdered the king, namely, to be burned alive; although petit treason, when committed by a man, as if the servant killed his master, was only punished by hanging. There is no question as to the legal principle of the difference; and it would be idle to attempt to disguise it. The murder of the baron by his feme was put upon precisely the same footing with the murder of the noble by his vassal, or of the bishop by a clergyman in his diocess; that is, of treachery to the person's liege lord and immediate sovereign. (4 *Bl. Com.*) And yet if we look to the true end and aim of all punishment, the prevention of crime, nothing is more absurd and mischievous. The husband is the stronger party; frequently he is bred to arms; more frequently still his profession or mode of life renders him familiar with deeds of violence. Under whatever system of laws, and in every country, the temper of the female sex is comparatively domestic, affectionate, and averse to cruelty; whilst the male sex are not unapt to lose their relish for the kindly charities of home in the stirring scenes of war, business, or politics, and are but too prone to acquire acerbity of feeling and harshness of character amid the stormy conflicts of life. Man bears the disappointments inseparable from our lot with less equanimity

than woman; temptations to vicious excess, resentment, sickness, his failure in favorite plans, unforeseen obstacles in the path of life, the daily altercations to which he is subject in the world; a hundred causes, from whose operation woman is altogether exempt, or which she meets with superior fortitude, all betray man into those occasional bursts of passion, which either precede or accompany the commission of violent crimes. Hence it is, that examples of the murder of the husband by his wife are extremely rare; while, to the disgrace of human nature, the opposite case has but too often occurred. And the inference we consider to be most plain, that if either party in the married state should be punished more than the other, for a domestic murder, it ought to be, not the wife, as by the common law, but the misguided wretch, who raises his hand to take away the life of his defenceless companion. It is the wife, and not the husband, who needs the protection of the law.

Another curious difference between the conditions of the two sexes in criminal matters, by the common law, arose out of the immunities claimed of old in favor of the clergy. Originally it was held, that no man should be admitted to the privilege of clergy, that is, of exemption from trial and punishment by the lay tribunals, except such as actually bore the clerical habit and tonsure. But in those days of ignorance, the mere ability to read soon came to be regarded as sufficient evidence that the party was a *clerk (clericus)*, and entitled him to the benefit of clergy. Afterwards, when the blessings of knowledge began to be more generally disseminated, and learning was no longer exclusively confined to the church, laymen as well as divines, gained admission to the privilege of clerkship, under certain modifications by statute, provided they were able to read. But women, being debarred by their sex from taking holy orders, were denied the benefit of clergy, however learned they might be; and remained subject to capital punishment for the first offence in simple larceny, manslaughter, and other felonies; although for the same offence, a man, who could read, was liable only to burning in the hand and a few months' imprisonment. However, in the reign of William and Mary, statutes were enacted, allowing women, guilty of any clergyable felony, to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*. (4 *Bl. Com.*)

The barbarous punishments, denounced by the common law against the crime of treason, are too well known to require recapitulation here. A part of the sentence, inflicting the most shocking outrages upon the body of the unhappy malefactor, was modified at an early period, in favor of women; for, as decency forbade the exposing and publicly mangling of their bodies, their sentence was, to be drawn to the gallows and there burned alive. But let it be observed, that while the law, merciless as it seems to be, shrunk from the brutality of the ordinary punishment in one particular, it took care to be more severe in another, by way of compensation for this imperfect leaning towards humanity. For the male traitor was first hanged, then mangled and burned, and finally decapitated and quartered; but the female was burned alive in the outset. (4 *Bl. Com.*) We shudder at the detail of these horrible cruelties, perpetrated in the abused name of justice. Happily some approaches to a better state of things have been forced upon parliament in later times; since by the statute 30 George III, ch. 48, before cited, it is enacted, that females, convicted of treason, shall be merely condemned to be drawn and hanged; and the milder character of penal jurisprudence in this country has preserved us from the degradation of legalizing such enormities.

As a corollary from the doctrine recognised by the common law, of the legal subjection of a wife to her husband, it was adjudged, in Lister's case (1 *Strange*, 478), that where a wife makes undue use of her liberty, either by squandering away her husband's property or by resorting to improper company, it is lawful for the husband, in order to preserve his honor and estate, to lay her under reasonable restraint. Nay, in Hardyman's case (2 *Str.* 875), where a husband declared his wife should neither sit at his table, nor have the government of his children, but be confined in a garret, by reason of her misconduct, Lord Raymond very cavalierly observed, that she deserved no better usage.

But although the husband may confine his wife, yet he may not imprison her. (*Prec. Chancery*, 492.) And if the parties are living apart, under articles of separation, the court will not permit the husband to seize the person of his wife; as was decided in a case where the celebrated John Wilkes figured to little advantage. The report of the case is worth transcribing, as relating to a personage of so much importance in his day.

'KING'S BENCH, EASTER TERM, 31 GEO. II.
Rex vs. *Mary Mead.*

'A *habeas corpus* having issued in the last vacation, at the instance of John Wilkes, Esquire, to bring up the body of Mary Wilkes, wife of the said John Wilkes, and daughter of the said Mary Mead, before Mr Justice Dennison, Mrs Mead now brought her into court.

'The substance of the return was, that her husband, having used her very ill, in consideration of a great sum which she gave him out of her separate estate, consented to her living alone, executed articles of separation, and covenanted never to disturb her, or any person with whom she might live; that she lived with her mother at her own earnest desire; and that this writ of *habeas corpus* was taken out with a view of seizing her by force, or some other bad purpose.

'The Court held the agreement to be a formal renunciation, by the husband, of his marital right to seize her, or force her back to live with him. And they said, that any attempt of the husband to seize her by force and violence would be a breach of the peace. They also declared, that any attempt made by the husband to molest her, in her present return from Westminster Hall, would be a contempt of the Court; and they told the lady, she was at full liberty to go where, and to whom she pleased.' 1 *Burrow*, 542.

Thus much for one side of the question. But we nowhere discover that the courts of law authorize or countenance any attempt to make the right of restraint reciprocal. The disinterested makers of law take good care not to commit such a solecism. And yet far greater necessity exists for affording protection to the 'honor and estate' of the wife against the extravagance or the profligacy of her husband, than for the reverse. It is not in the power of a wife, to waste her husband's property by lavish expenditure, without his consent; nor, indeed, her own property either. Of his income or his capital she can obtain no more than he pleases to bestow; and he is liable, as will be explained at large hereafter, for no debts of her contracting, except they be for necessaries. But he, on the other hand, can profusely squander away most of his own property, and most of hers beside, in riotous living, or risk it upon the throw of a die, or embark it in desperate speculations, in consequence of which she may be reduced instantaneously from affluence and ease to indigence and wretchedness.

Again, there is little danger that a wife will abandon her husband's bosom, unless she be driven from it by ill usage, or

corrupted and seduced by some profligate friend, whom he himself domesticates at his fireside. And this, compared with the instances wherein a husband deserts his wife, is a rare case. She is bound to his house and his hearth by the nature of her duties, by the care of her children, by the laws of the land, and by the despotic usages of society, more imperative and imprescriptible by far than all the codes in the universe. Her functions are domestic; her education is domestic; her temper is domestic; the constitutions of Providence have made her domestic; her happiness, her pride, her glory, all that exalts her in estimation above the other sex, lies in the round of endearing charities, which enliven, bless, and purify the domestic circle. She may be drawn from it, for a season, to mingle in the amusements of the world, and the pleasures of general society, which occupy their appropriate place among the agents that form her character; but it is on home, that her affections must finally and chiefly rest. It is a principle too firmly implanted in her soul to be shaken by slight causes.

Not so with the other sex. Wherever a man's heart may be, his serious pursuits and regular occupations are abroad, in his counting-room, or his office, upon the exchange, or in the forum, or wherever else the calls of interest, ambition, or duty may demand his presence. His being is not so essentially domestic. It is always in his *power* to abandon his abode, if caprice or evil passions prompt him, without of necessity losing his claims to free admission in society, certainly without fatal prejudice to his means of subsistence and of enjoying life. It by no means follows, because he is a wanderer, that he is therefore miserable; nor because he is homeless, that he is therefore an outcast. His sex is to him a charter of freedom; and if he possess a few grains of the ingenious Quesnay's *poudre de prelinpinpin*, he bears the universal passport, the warranty of welcome in every land. Hence it happens, we believe, and the records of justice will make good our assertion, that for one wife, seduced from home, there are many husbands, who abandon it; and for a single case in which a husband is under the necessity of asking aid of the laws to reclaim his wife, very many occur in which the wife is consigned to more than the sorrows of widowhood by the desertion of her unfeeling husband.

Anciently, it was held in England, that a husband might inflict moderate chastisement on his wife for her domestic government,

subject to the same restrictions which applied to the right when exercised upon children or servants. (1 *Bl.* 444.) In Fitzherbert, there is the form of a writ of *supplicavit* for binding over the husband to security of the peace on account of his threatening his wife's life, or mutilation of her limbs. (*Fitz. N. B.* 80.) The writ commands the sheriff to see that the husband shall do no injury to the body of his wife, other than such as, for the purposes of domestic correction and government, may lawfully and reasonably appertain to a husband. (See *Moor*, 874; 2 *Johns. C. R.* 141.) But in Lord Lee's case, Sir Matthew Hale said, that *moderate castigation* in the register, was not meant of beating, but only of admonition and confinement to the house, in case of extravagance. (3 *Keble*, 433.) Therefore it is that Blackstone says; 'With us, in the politer reign of Charles the Second, this power began to be doubted; and a wife may now have security of the peace against her husband, or in return a husband against his wife. Yet the lower rank of people, *who were always fond of the old common law*, still claim and exert their ancient privilege.' (1 *Com.* 445.) If we are to judge of the excellence of 'the old common law' by this its adaptation to the vulgar feelings and habits of the most degraded members of the community, it would hardly seem deserving of much commendation. Indeed the remark instantly suggests the parallel case, in which Sir William's annotator declares that 'general terms of scurrility may be used with impunity, and are part of the rights and privileges of the vulgar.' (3 *Com.* 125, *Christ. note.*) To those only, we feel sure, who are lost to all sense of shame, would the privilege of striking a wife be now extended by the courts, either in England or America.

Indeed, this right was doubted much earlier than the reign of Charles the Second. For in Sir Thomas Seymor's case (*Moor*, 874, *more full in Godbolt*, 215), it is said; 'Cook, chief justice, held, that the husband could not give correction to his wife; but Nicols and Warburton, justices, held the contrary.' This opinion is creditable to the feelings of Sir Edward Coke; but true it is that the old authorities are against him. Bracton has the expression; 'There are some persons under the rod (*sub virgâ*), such as wives. (*Lib.* i. c. 10, p. 2.) And the well known opinion, respecting this point, pronounced at *nisi prius*, by Sir Francis Buller, a judge, as every lawyer must concede, whose character and talents adorned the bench, we imagine has been censured by many, who never entirely com-

prehended its import. He is reported to have sanctioned the doctrine of the husband's right of domestic chastisement; and when questioned as to the dimensions of the rod or thong with which it should be inflicted, to have assimilated it, with great simplicity and *bonhommie*, to the size of his own thumb; which gave occasion to the fair sex to express much very pardonable curiosity concerning the magnitude of that part of his lordship's hand. But the similitude itself is traced to the times of Bracton; who, tradition reports, was much more unfortunate than Sir Francis Buller, because the women of the town where he lived punished him for his disregard of their comfort by plunging him in a horsepond. (12 *Serg. & Raw.* 226.) The principle, stating the thing in a naked abstract shape, certainly is admitted by the law; and Sir Francis may have said so; but if the principle were put to the test by an actual case, we do not believe a court or jury would justify the battery of a wife by her husband much sooner, nor under much less aggravated circumstances, than if it were the opposite fact, of the battery of a husband by his wife. No judge or jury, we apprehend, could be found to outrage public opinion by lending their countenance to such violence on either side, unless in the contingency of some unhappy female of masculine character, in the deepest debasement of moral and social condition.

In the ecclesiastical courts in England many decisive cases on this point occur. Thus Sir William Scott says, the court will not interfere on account of ordinary domestic altercations, but that whenever 'words of menace' are proved, the wife may claim protection. (2 *Phil.* 111; 1 *Hag.* 458.) So like security is there extended to the husband (1 *Hag.* 409); and if a wife wilfully provokes her husband to violence, she loses all right of legal redress for it, unless his resentment was altogether disproportioned to her own misconduct. (2 *Phil.* 133; 1 *Hag.* 364.) But acts of domestic oppression much short of a blow, such as continued insult, indirect efforts to inflict distress, as by cruelty towards a child for the purpose of wounding the mother's feelings, and the like, afford, in strong cases, adequate ground for allowing a separate maintenance. (2 *Phil.* 207.) And we state this right of protection as being reciprocal by the principles of the law; because it undoubtedly is so in England, and the decision of Chancellor Kent to the contrary rests upon the particular terms of the statute of New York. (4 *Johns C. R.* 503.) And the last named eminent judge confirms the

position above stated that, although mere petulance, and rudeness, and sallies of passion, might not be sufficient, yet acts of perpetual violence, danger of life, limb, or health, or just apprehension of bodily hurt, will entitle the wife to the protection of the court. (4 *Johns. Ch. R.* 189.) But the judicious remarks of Sir William Scott, in a case in the Consistory Court, are particularly deserving of attention. He observes;

'What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the married state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty, against which the law can relieve. Under such misconduct in either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connexion; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence.' 'Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation;' 'of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessaries, is not cruelty.' 1 *Haggard*, 38, *Evans* vs. *Evans*.

Whether it be that peers are more pugnacious at home than commoners, or that their domestic affairs are scrutinized and reported more faithfully, certain it is that many examples of their domestic tyranny have made their way into the books. Perhaps it may be because peers can be put under recognisance to keep the peace only by the courts of king's bench or chancery. (4 *Bl. Com.* 251.) Among the examples of dishonorable notoriety are the cases of Lord Lee, the Marquess of Carmarthen, Lord George Howard, Lord Vane, the Earl of Stamford, Earl Ferrers, and Lady Strathmore. (1 *Hawk.* 255, *note.*) The case of Lawrence, Earl Ferrers, two years afterwards convicted of murder, and executed (*Foster*, 138), who frequently suffered himself to be betrayed into violent transports of passion, to the imminent peril of his lady, a sister of Sir William Meredith, is interesting in a legal point of view, as illustrative of the admirable juridical character of Lord Mansfield. Earl Ferrers had been commanded, by writ of *habeas corpus*

issuing from the king's bench, to bring up the body of his countess, on complaint of her friends; and the earl, disobeying a first and second writ, was at length compelled to appear by a peremptory writ of attachment. On that occasion the question was canvassed and settled, whether the king's bench could issue an attachment against a peer during the sitting of parliament for contempt of court only; and Lord Mansfield successfully maintained the affirmative, on the bench and in the House of Lords. When Earl Ferrers came to Westminster Hall, he sent a message to the chief justice, desiring to speak with him; but Lord Mansfield bid the messenger tell the earl, that when an affair was depending before the court, he could not speak with any body upon it *but* IN *court.* Thereupon the parties came into court, Lady Ferrers having articles of the peace ready to exhibit. The earl then desiring to interrogate his lady, Lord Mansfield told her she was not obliged to answer any questions previous to swearing the peace; and the earl or his counsel, seeking to draw an answer from her by intimating that it might prove for her interest to reply, Lord Mansfield immediately said he had before told her she *need not* answer them; and now he would *not suffer* her to answer them; and the earl accordingly gave the security required without further delay. (1 *Burrow*, 631.)

Our ungallant fathers of the common law provided a peculiar punishment for common scolds, but carefully confined the crime and the punishment to scolds of the female sex. Scolds are defined in the books to be 'troublesome and angry women, who, by their brawling and wrangling amongst their neighbors, break the public peace, increase discord, and become a public nuisance to the neighborhood.' (*Tomlins' Jacob*, s. voc.) Our ancestors thought, perhaps, that men being indictable as common barrators or movers of suits and quarrels, and there being no precedent of such an indictment having fallen upon a woman (2 *Rolle's Rep.* 39), although Hawkins thinks there is no good cause why it should not lie (1 *P. C.* 525), therefore it was not amiss for the latter to be exclusively liable to punishment for scolding. The barrator is only subject to fine or imprisonment; but the scold was indictable as a common nuisance, and if convicted was sentenced to be placed on a certain engine of correction called a castigatory, trebucket, or cuckingstool, and after being exposed thereon to be plunged in the water. (4 *Com.* 168, 1 *Hawk.* 361, 365; *Toml. Jacob*, s. voc. *Castig.*)

Several cases are reported in England of questions arising on such prosecutions. The indictment is insufficient if she be merely charged as *communis calumniatrix* (2 *Strange*, 849), or as a *common brawler* (2 *Str.* 1246); it must use the technical phrase *rixatrix* or scold (6 *Modern*, 11); and must lay the scolding to be to the common nuisance of the neighborhood (2 *Hawk.* 325). In queen Anne's reign a poor woman, of the name of Foxby, had the misfortune to be indicted for this misdemeanor, but by resolutely standing upon her defence, fairly baffled her persecutors. Her case comes up no less than four times in a single book of law reports. Being convicted, she moved an arrest of judgment, because the indictment ran, that she was a common *calumniatrix* instead of *rixatrix;* and judgment was arrested. But when the exception was taken at Trinity term, Chief Justice Holt jocosely suggested to her, that 'it were better ducking in Trinity than in Michaelmas term.' She was again indicted, it would seem, as *communis rixa;* and this being held to be defective (*Ld. Raymond*, 1094), judgment of the court below was reversed upon writ of error in the king's bench. It was requisite that the error should be assigned by the party in person; and when she moved the court for permission to appear by attorney, on account of illness, the court refused it, but allowed further time for her appearance. The court said; 'Scolding once or twice is no great matter; for scolding alone is not the offence; but frequent repetition of it to the disturbance of the neighborhood makes it a nuisance, and as such it has always been punishable in the leet, and so indictable.' It is added; 'They enlarged the time till next term, to see how she would behave herself in the mean time; for Chief Justice Holt said, ducking would rather harden than cure her, and if she were once ducked, she would scold on all the days of her life.' (6 *Mod.* 11, 178, 213, 239.)

We are not aware, that this relic of ancient coarseness has been recognised in this country, as adhering to any of the American codes; and a recent English writer speaks of the punishment as being antiquated and almost obsolete. A case lately decided in Pennsylvania may be considered as furnishing a safe precedent for all the other states in the Union. The Court of Quarter Sessions for the county of Philadelphia, in October, 1824, convicted Nancy James of being a common scold, and in obedience to several precedents in the same court, but none later than 1782, sentenced her to the duckingstool and

to be three times plunged in the water. Upon writ of error, brought in the Supreme Court, this tribunal had sufficient manliness to resist the attempt to revive the barbarous usage, and pronounced that the punishment itself had no legal existence in Pennsylvania. (12 *Serg. & Rawle*, 220.) In Massachusetts it is settled that this mode of correction, as singular and ludicrous as it is cruel, is incompatible with a provision of the constitution, which prohibits the infliction of all 'cruel and unusual punishments.' (*Davis's Justice*, p. 525.)

Generally, a *feme covert* is held to answer as much as if she were *sole*, or unmarried, for offences against the common law, or a statute, and may be separately punished for them by way of indictment; for this being a proceeding grounded on the infraction of a law, it would be unjust that her husband should be included in it for an act to which he is in nowise privy. Thus we have precedents of indictments against women for treason, murder, robbery, theft, burglary, forcible abduction, riot, assault and battery, trespass, slander, usury, and many other crimes, which it is needless to enumerate. But if a married woman incur the forfeiture of a penal statute, her husband may be made a party to the process, and shall be liable to answer for the penalty recovered. (1 *Hawk.* ch. 1, s. 13.)

But the doctrine of the legal subjection of a wife to her husband is brought to bear greatly to her advantage upon criminal matters. She is so far favored in respect of the power and authority which he has over her, that a *feme covert* shall not suffer punishment for larceny or burglary committed in company with, or by coercion of her husband. (*Kelyng*, 31.) Indeed, Blackstone lays down the principle much more broadly, saying that in such cases she is not punishable for theft, burglary, or other civil offences against the laws of society, she being considered as acting by compulsion, and not of her own will. (4 *Com.* 28; 10 *Mass. Rep.* 152.) But he afterwards subjoins, that the rule does not apply to crimes that are *mala in se*, for the perfectly satisfactory reason, that 'it would be unreasonable to screen an offender from the punishment due to natural crimes by the refinements and subordinations of society. But if she commit robbery in company with, or by coercion of her husband, she is punishable; and the reason assigned for punishing in this instance, and not doing so in that of burglary or larceny, is because in the latter case the wife is, by a

fiction of law, supposed not to know what property her husband may have in the goods clandestinely taken (10 *Mod.* 63), but in the former the presence of the true owner of the goods constituting the essence of the crime, she cannot but know in what right they are taken (1 *Hawk.* 4). For the same cause of her legal subjection to her husband, she is not deemed accessory to a felony, for sheltering her husband who has been guilty of it, as the husband shall be for receiving her; nor if she receive her husband, when he has committed treason, is she punishable as a principal in the crime, because being under his power, the law presumes she is constrained to receive him; neither is she affected by receiving jointly with her husband any other offender. (1 *Hawk.* 4.)

But if she commit a theft of her own voluntary act, or by the bare command of, and not in company with, or by coercion of, her husband, she is no longer protected. Nor shall the plea of coverture avail the wife, nor any presumption of the husband's coercion extenuate her guilt, if she commit treason, murder, or manslaughter; because of the enormity of the act in respect of all these crimes, and in respect of the first for the further reason, that the law will not suffer the husband to claim that obedience from his wife, which he himself as a subject or citizen has refused to pay. (4 *Com.* 29.) And at the present time courts are much more strict in requiring proof of the husband's coercion than formerly; and it may be doubted whether the mere presence of her husband would be considered to furnish more than a *primâ facie* presumption of coercion. (2 *Starkie's Ev.* 705.) Indeed, the practice seems to have been originally encouraged out of tenderness to her sex, and in order to evade the unjustifiable rigor of the law, which denied the benefit of clergy to the wife; for it would have been extremely odious, where a husband and wife had jointly committed the same felony, to execute the wife and dismiss the husband with a slight punishment. (*Christian's note*, 4 *Bl. Com.* 29; 2 *Stark. Ev.* 704.) Therefore, since the statute, extending the benefit of clergy to females, was enacted, it has been held, that nothing short of the actual presence of the husband, and his direct personal participation in the act, will excuse the wife. (2 *Starkie's Ev.* 581.)

Another distinction contained in the books is worthy of note for the singularity of its operation. As a husband and wife are considered but as one person in law, a *feme covert* cannot

be guilty of larceny by stealing her husband's goods; because, say the lawyers, it is tantamount to a man's committing theft upon himself. Furthermore, the husband, by endowing the wife, at their marriage, with all his worldly goods, communicates to her a qualified interest in them; for which cause even a stranger cannot commit larceny in taking the husband's goods by the delivery of his wife; but he may, by taking away the wife by force and against her will, together with the goods of the husband. (1 *Hawk.* ch. 33, s. 19.)

Many other illustrations of this part of our subject might be given; but to avoid the hazard of fatiguing our readers with too much crown law, we shall pass on to a different class of considerations. And ere we enter upon the rights of a *feme covert* as to property, we crave to be indulged in stating here certain consequences of the matrimonial relation, as to legal proceedings, which stand by themselves. Thus it was anciently holden, that no woman was competent evidence to prove the legal condition of a man, as whether bond or free. (*Coke Lit.* 6 b.) So also women, together with peers, children under twelve years of age, and the clergy, were exempt from the general attendance at the sheriff's court-leet, where all other persons were compelled to appear. (*Stat. Marleb.* c. 10.) It is another curious point of the old law, that a woman could not be an *approver*, that is, one, who, standing indicted for treason or felony, confesses his guilt, and to obtain a pardon undertakes, at his peril, to convict his partners in crime; and the reason of it was, because the *appellee*, or party accused by the approver, was entitled to the wager of battle to prove his innocence; and a woman, being incapable of waging battle in person, was debarred the privilege of approving. (2 *Hawk.* 294.)

But it is a rule of law of more importance, since it is one of daily use, that the husband and wife cannot be witnesses for each other, because their interests are identical; nor against each other, because this would be contrary to the policy of marriage, and might create domestic dissension and unhappiness. (1 *Com.* 443.) It is edifying to observe the reasons which the old lawyers give for the rule. Thus Sir Edward Coke very summarily settles it on the ground, that *they twain are one flesh.* (*Coke Lit.* 6 b.) Sir William Blackstone says, 'if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, *Nemo in propriâ*

causâ testis esse debet; and if *against* each other, they would contradict another maxim, *Nemo tenetur seipsum accusare.*' But this is altogether artificial; and the simple reason is the right one, their identity of interest and affection. That this alone is the true reason is confirmed by the fact, that identically the same incapacity exists by the civil law, which even goes further, and refuses the reciprocal evidence of father and son, and brother and sister. (*Brown. C. L.* 85.) Without entering at large into the numerous applications of the principle, it will suffice to observe, first, where either husband or wife is a party in any proceeding, civil or criminal, the rule is universal, that the other is altogether incompetent to testify. Secondly, where one of them, not being a party, is interested collaterally in the result, neither is witness *for* the other; and if the husband be disqualified by reason of interest, the wife is also disqualified; but in certain cases, where the husband's interest does not protect him from examination, neither will it protect the wife. Thirdly, where neither of them is either a party to the proceeding or interested in the result, the husband or wife is competent to prove any fact, provided the evidence does not directly criminate the other. (2 *Stark. Ev.* 706–714.) These explanations are sufficient to elucidate the operations of the general principle, to which there are few exceptions, and those only in cases of evident necessity, as, for instance, the wife is admissible to prove a charge against her husband of violence committed on her person.

We proceed to consider the consequences of the constructive unity of the husband and wife, in its influence upon the rights of property, where it operates with the greatest hardship against the wife. The reader must bear along in his mind this fundamental principle, that they are one person in law, and he will readily see why it was that, according to the common law, by no conveyance could the husband give an estate to his wife, nor the wife to her husband, unless through the intervention of trustees. (*Coke Lit.* 187 b; 1 *Greenl.* 394.) And for the same reason, if a woman owns any estate of freehold and marries, her husband shall be seized, and have a freehold in the lands, in his wife's right; and he becomes absolutely entitled to the rents and profits of it during her life, and the rents and profits may be aliened by him or taken in execution for the payment of his just debts. The fee remains in her, but he is entitled to the administration of the property, and to all the

income it may afford. Chattels real, that is, estates for a term of years and the like, are also vested in him by the marriage, and he may dispose of them or forfeit them for crimes, and they may be extended upon for his debts; but he cannot devise them away by will, and if he omit to make any disposition of them in his lifetime, they survive to his wife. As to the wife's personal property, the law makes this distinction; the marriage operates as an absolute gift to the husband of all her personal property in possession, such as money, goods, cattle, furniture, and the like, so that he may make any disposition of them at his pleasure, without his wife's consent, and if she survive him they go not to her, but to his legal representatives. And the marriage operates in like manner as a gift to the husband of all the wife's personal property not in possession, such as annuities, claims in law, obligations, provided the husband reduces them into possession by receiving them, or by recovering them at law; but if he fail to do this, they survive to his wife. The rule is the same with respect to every species of property, whether owned by the wife at the time of the marriage, or whether it accrues to her during the coverture. And, finally, if the husband have by his wife issue, male or female, born alive, which by any possibility may inherit, and the wife dies, her husband is entitled to hold all her real estate by a peculiar tenancy called the curtesy of England. (*Bingham*, ch. ii, *Comyn*, *Bacon*, *Blackstone*, &c.) Such are the husband's rights in his wife's property.

Now let us look at the other side of the picture, and consider what it is, in a pecuniary point of view, that the wife gains by the marriage, in consideration of her parting with all her personal property for ever, and all her real estate during her husband's life. He is, in the first place, liable for all her debts contracted before marriage, and this whether he received any portion with her or not; because he took her for better or worse, and it is to be presumed that he informed himself of her condition before he assumed the burden of matrimony.

Secondly, he is obliged to maintain her, and may be compelled by law to provide her with all necessary food, apparel, and attendance, according to his rank or circumstances; and if he refuses or neglects to do this, she may by the common law sue out a writ of *supplicavit* to compel him to supply her exigencies (*Per Sir M. Hale*, 1 *Sid.* 109; and see 2 *Ves. Jr.* 195), or she may sue him for alimony, or she may contract

debts to obtain necessaries for herself, children, or family, which the creditor may sue him for in law and force him to pay. But in the leading case upon the subject (*Manly* vs. *Scott*, *Sid.* 109 and 1 *Mod.* 128), Sir Matthew Hale pronounced a very elaborate opinion, in a part of which he carefully decides that a wife has, upon the marriage, no 'original, inherent, primogenial, and uncountermandable power to charge the husband for her necessities.' In order, therefore, to prevent the theory of the law from openly violating the plainest principles of common sense and common humanity, the sages of our jurisprudence say that, although the husband is not bound by an original and inherent right of the wife to support, yet an implied precedent assent of his to her contracts for necessaries may be raised upon the fact of their cohabitation in the state of lawful marriage. Such is the labyrinth of absurdities and overstrained niceties of distinction, into which the theory of our law relative to female rights betrays the wisest judges. However, they contrive to admit that in one shape or another he is liable, and this even if her character be dissolute, provided he permits her to reside with him as his wife. Nor can he throw off the obligation by abandoning her, or by expelling her from his house, or forcing her by ill usage to leave him of her own accord; only if he allows her a separate maintenance, he is not liable for her debts so long as that is duly paid; and he is not liable to particular persons whom he has prohibited, not by a general warning in the newspapers, but specially, from giving her credit. So that, so long as a husband is in good credit and in the possession of property, his wife is assured all the necessaries and conveniences of life, according to her condition and degree. (*Bacon's Ab. B. and Feme*, H.)

Thirdly, upon the death of her husband, his widow is entitled to demand her dower in all the lands and tenements of which he was seized at any time during the coverture, a regulation which Tacitus found in full rigor among the ancient Germans (c. 18). The unlearned reader should carefully distinguish between the word *dower* as used in the civil law, where it signifies a wife's marriage portion, and the same word as it occurs in our law, where it merely imports an estate for life in one third of all the husband's real estate. By the ancient forms, a husband usually proceeded, openly at the church door, after affiance made and troth plighted, to endow his newly married bride in the whole of his lands or such part as he

should specially designate; a custom of which evident traces still remain in the beautiful and appropriate marriage service of the episcopal church. But the endowment of the wife in one full third of her husband's real estate has been long the established law of England, and of all those countries which borrow their jurisprudence from the English code. By the common law, the widow cannot be deprived of dower by any deed, devise, or other legal act of her husband alone; but she may be barred of it by elopement, divorce, being an alien, treason of her husband, and in other ways; but the most usual method is by means of a jointure, or competent estate, settled upon the wife, to take effect immediately upon the death of her husband, in lieu and in full satisfaction of her dower. (2 *Bl. Com.* 129.) Besides the ordinary modes of barring the widow's dower, the customary law of Massachusetts and of several of the United States provides the further course, of a wife's voluntary relinquishment of dower in all or any specific part of her husband's lands, by executing a deed thereof jointly with her husband, expressly releasing her claim of dower. (7 *Mass. Rep.* 14, *Fowler* vs. *Shearer*, *&c.*) We may subjoin, that a wife cannot be barred of her dower in the United States, as she may in England, by the treason of her husband, nor by any means whatever except her own free act and deed, her dower not being liable for the payment of his debts, and being thus absolutely secured to her, after her husband's death, in every contingency.

Lastly, by the English statute of distributions, the substance of which, under various modifications, has been transferred into the jurisprudence of the several United States, if a person die intestate, leaving a widow and children, one third part of his personal property goes to the widow, and the residue in equal proportions to all the children; but if he leaves no children, then one half to his widow, and the other half to his collateral heirs. (2 *Bl. Com.* 515.) But the husband still retains full power to dispose of all his personal estate by incurring debts which it shall go to satisfy, or by deed of gift or sale during his life, or by devise to take effect afterwards; so that it is in the power of a cruel or improvident husband if he was never seized of any real estate during the coverture, to leave his wife in absolute indigence at his death, and this although he may have died in a state of affluence, and of affluence derived from the marriage of the wife herself. So that, on a fair statement of

the balance of pecuniary advantages and disadvantages to each party, it will appear that, during coverture, the husband is entitled to all the profits to be derived from the joint estate of both husband and wife, to live in splendor upon the income of the lands, or speculate in commerce upon the capital of her money and chattels, subject only to the charge of providing her with necessaries; that on the death of the wife, if she have had children, he enjoys all her lands for life, and her personal property is wholly and absolutely his at all events; but that on the death of the husband, his widow can claim only one third of his estate of inheritance, and one third, or more, or none at all, of his chattel estate, according as his caprice and the operation of the law may determine.

The unjust partiality of the common law to the male sex is manifested, in a remarkable manner, by two or three differences between tenancy by dower, and the corresponding estate of tenancy by the curtesy. Attainder for high treason operated the forfeiture of all the traitor's lands and tenements of inheritance, if he were of the male sex, including his wife's dower by express provision of a statute (5 and 6 *Edw.* VI. ch. 11), in order, it is said by the lawyers, to deter men from the commission of this crime by the prospect of the total poverty, added to loss of rank and mental suffering, which it must entail upon his wife and children. But the gallant barons and loyal knights and burgesses, who so liberally and generously provided for the impoverishment of their unhappy widows, if they themselves should be attainted of treason, were too wary and cunning to subject themselves to the like penalty. And therefore if the wife be attainted of treason, yet her husband shall be tenant by the curtesy of all her lands. (4 *Bl. Com.* 380.) Again, it is well settled that a husband shall be tenant by the curtesy in an equity of redemption belonging to his wife (*Cashborne* vs. *Inglis*, 2 *Eq. Abr.* 728; 1 *Atk.* 603); and although the two estates exist in the same species of right, it seems to be decided in England, although contrary to the opinion of many sound jurists in this country, that a widow cannot be endowed of her husband's equity of redemption. (See *Reeve's Dom. Rel.* 33; 4 *Day*, 306; 13 *Mass. R.* 227; 15 *Johns.* 319; 2 *Southard*, 885.) Again, it has always been holden, and we think *wrongly* decided, that a wife cannot be endowed of her husband's estate in trust (3 *P. Wms.* 234); and yet Lord Cowper has made it to be the law, that a husband

shall be tenant by the curtesy in his wife's trust estates. (2 *Vernon*, 681; 1 *P. Wms.* 108, and 2, 713.) We cannot but consider these contrasted differences to be very striking, especially when we reflect, as every lawyer ought, upon the very unsatisfactory and inconsequent reasoning by which the stronger sex have settled the two last cases against the weaker one, and doubly in their own favor.

It is far from our intention to disparage the law under which we live, whose many and great excellencies we feel proud to acknowledge. But regarding the present topic as one of its most defective portions, we venture to touch upon one other class of cases in which woman is placed in a state of subjugation to the male sex, namely, in respect of all contracts. For it is generally true that a *feme covert* has no power to make a contract in her own right without her husband; and therefore such a contract is absolutely void. And if a wife sell or dispose of the money or goods of her husband without his assent, the sale is void, and the husband may bring an action to recover possession of the property. Nay, it is the same if she loses money at cards. (1 *Sid.* 120.) And if she buy goods, or contract to buy them, the price cannot be recovered in law, unless they consisted of necessaries, as we have before stated. So far is this incapacity extended, that by statute in England (32 *Hen.* VIII. c. i.), and by decisions in most of the United States, a *feme covert*, although she may dispose of money by will with her husband's assent, yet even with that she cannot make a devise of her lands so as to bar and exclude her heir at law. (12 *Mass. Rep.* 525. But see *Reeve's Dom. Rel.* ch. 11 and 12.) And all actions for her benefit, whether relating to her own separate property, or for injuries done to her person, must be sued either in her husband's name or in their joint names, according to various technical distinctions applicable to particular circumstances. (*Comyn's Dig. B. and F.*)

Some few cases occur in the books, wherein a married woman is entitled to make contracts for her benefit, and to sue and be sued, from the necessity of the thing. It is where the husband is dead in law, and therefore disabled to sue or be sued in the right of his wife; for in such case, if she were not treated as a *feme sole*, she would be without remedy for any injury sustained by, or claim accruing to her, and persons of whom she purchased necessaries would be equally remediless. Thus if a husband has abjured his country, or is banished

either for life or for a limited time, or if he is an alien residing abroad, leaving his wife resident here, she is considered competent to contract. And by the custom of London, a married woman who trades by herself in a traffic with which her husband does not intermeddle, is regarded so far as having separate rights, and capable of bringing or defending a separate action. (*Bacon's Abr. B. & F.*) But the extreme rigor of the common law maxims in this respect press so heavily upon the female sex, in various contingencies, that the courts of chancery in England have assumed jurisdiction in order to afford parties that relief which equity requires. In those of the states, such as New York, for example, where a court of chancery exists with competent powers, a wife can obtain suitable protection for her separate rights; but it is otherwise in those states, where, as in Massachusetts, for example, the want of correct information upon the subject has kept alive an illiberal and unfortunate spirit of jealousy towards equity jurisdiction. With a brief statement of the salutary operation of chancery herein, we shall close our protracted remarks on this head.

In chancery, if a wife claims any rights adverse to those pretended by her husband, she may procure an order to sue or be sued separately. The general circumstances in which equity lets in the wife to exercise this privilege, are where anything is given or accrues to her separate use, or the husband refuses to perform marriage articles, or articles for a separate maintenance, or where the wife, being deserted by the husband, acquires property by her individual skill or labor. An example will elucidate the salutary tendency and effects of this authority more clearly than the most elaborate reasonings. Thus, a husband was attainted of felony, and his sentence commuted for transportation; and in the mean time his wife became entitled to some personal property, which the husband undertook, as he lawfully might, to gain possession of at common law. Lord Chancellor King compelled him to relinquish his claim, and ordered the money to be vested in government securities for the wife's benefit. (3 *P. Wms.* 37.) A husband deserted his wife and children for fourteen years, and then returned, and, exercising his common law rights, took possession of property earned by her labor during his absence; but a decree was obtained from Sir Joseph Jekyll, obliging him instantly to restore it all to his injured wife. (1 *Atk.* 278.)

Again, a husband abandoned his wife for the space of twenty years, after which she became entitled to personal estate by inheritance, and her husband came forward and claimed it; but Chancellor Kent, upon a bill being filed, ordered the money to be invested and secured to the wife's use. (4 *Johns. C. R.* 318. And see 3 *Cowen*, 590.) In all these, and a multitude of analogous cases, the injured party could have no adequate remedy at law (*Bacon's Abr. B. & F.; Comyn's Dig. B. & F.;* and *Chan.* 2 *M.*); but is protected by a court of equity, which acts, in this particular, upon the principles of the civil law.

We abstain from remarking upon the rules governing marriage and divorce, pertinent as they are to our subject, because we feel admonished that we are overstepping the limits assigned us. But an explanation may be permitted, in conclusion, concerning a peculiarity in the laws of succession, which essentially affects the condition of woman, namely, the much talked of salic law; a text usually considered as affording authority for the exclusion of females from the throne of France. The salic law is a code of one of the ancient Frankish tribes, and the precise text, upon which inferences so important are built, is in the following words, 'No portion of inheritance in the salic land shall pass to females; but this belongs to the male sex, that is to say, the sons shall succeed to the inheritance itself.' (*Montesq. Es. des Loix*, l. xviii. ch. 22.) It is satisfactorily shown by Montesquieu, and indeed appears from inspection of the law itself, that it was only a municipal regulation, designed for the succession of the private property of individuals, having no reference to the crown, and least of all to that of the kingdom of France. By the phrase 'salic land,' neither the French territory, nor, as others suppose, a country in Germany, is intended. It signified, in its original acceptation, as used among the ancient German tribes, the *curtilage* of a dwellinghouse, the space reserved by each individual around his abode, according to the usage noticed by Tacitus. (*De Mor. Germ.*) The origin of the law is thus explained. The lands cultivated by the ancient Germans were given them only for a year, at the expiration of which they reverted to the community. Each individual owned in severalty no land except the curtilage of his house, which was called the *salic land*, and descended with the house itself to the male who was to occupy it as the master of the family.

If a female had been permitted to inherit the salic land, the consequence would have been, that she might carry it by marriage to her husband, who, contrary to the true design of the thing, would thus possess two houses with the respective curtilages of each, that is, two shares of salic land.

But simple as the law was in the beginning, it acquired a wider comprehension when the Franks, having subjugated so large a portion of the Western Empire, and becoming the masters of extensive fiefs, naturally enough had recourse to the analogous case of their salic land for a rule by which to govern the succession of their new territorial possessions. The necessities of a barbarous monarchy, supported only by deeds of violence, tended to strengthen the analogy as applied to the succession of princes during the first race; because the rude warriors of that age demanded a ruler of the male sex, and one as rude as themselves, to lead them in battle. Precedents, therefore, frequently occurred of the exclusion of females from the throne during the history of the first race, and occasionally in that of the second; and the crown happened to descend from father to son during eleven generations of the third race; so that when Louis Hutin died, leaving only a daughter, the states of the kingdom solemnly and deliberately declared the exclusion of females from the crown to be the law of the realm, and raised Philip the Long to the throne, as they did successively Charles the Fair, and Philip of Valois, in each case to the prejudice of females more nearly related to the crown. And notwithstanding the imperfect foundation in law for this exclusion, still, having been acted upon for nine hundred years, it must be admitted the states of the kingdom were perfectly justified in pronouncing it to be part of the fundamental constitution of the monarchy. Yet the alleged illegality of this exclusion was the pretext for repeated invasions of France by English princes, who pretended a right to the throne derived through females, and who seemed to think, with the archbishop of Canterbury, in Shakspeare's 'Henry the Fifth,' that the dispute could be settled in their favor by astute criticisms upon the salic law. It is clear that a principle of succession uninterruptedly observed for nearly a thousand years required no confirmation, and could gather little strength from an obscure old text of the Frankish conquerors.

Of the wisdom of such a provision, however, there is much ground to doubt, and still more of its justice. We speak not

of the question in reference to a savage state of manners; but if we did, many safe precedents could be adduced in favor of admitting women to an equality in this respect with the male sex. Grant that the tales of the ancient Amazons are in some sort apocryphal, and that Spanish or Portuguese friars, who would have us believe similar governments exist in America, err a little on the side of the marvellous. Still we know that among many warlike tribes, of the old world and of the new, women have been permitted to assume the honors of royalty. Cases abound in America; nor are they wanting in Europe and Asia. In ancient as in modern Britain, women could aspire to empire (*Tac. Jul. Agric.* c. 16), as the illustrious name of Boadicea may well attest. The influence of the female sex, and the authority of their counsels are apparent in every page of the history of the ancient Germans, notwithstanding they originated the principle embodied in the salic law. The names of Semiramis and of Catharine of Russia, if they raise the recollection of some personal weaknesses, are also associated with reigns of prosperity, splendor, and glory; nor would any masculine hand have been likely to sway the sceptre of empire with more of princely dignity and power. Zenobia might boast that but for the fatal supremacy of the Roman arms, she would have continued to show herself as worthy to reign as Aurelian himself. And if talent and fitness are good titles to power, certainly the proudest male of the line of Tudors, or Plantagenets before them, did not possess a right to rule more divine, a more clear and legitimate charter by nature, than Elizabeth of England. Indeed, it is one of the singular anomalies, which sometimes find a place among human institutions, that, in countries where woman is debarred access to all inferior political dignities, the right of succeeding to the crown should be made an exception in her favor. And it is, therefore, a subject of gratulation, that, in a great majority of instances, when exalted to the highest of all political stations, woman has proved competent for the arduous duties she had to discharge.